STATE OF MICHIGAN

COURT OF APPEALS

DANIEL F. GOULD, d/b/a GOULD CONTRACTING, and GOULD CONTRACTING, INC.,

Plaintiffs/Counter-Defendants-Appellees,

and

SOUTHEAST CONCRETE, L.L.C.,

Intervening Plaintiff,

v

STEPHEN LEWICKI and TERI LEWICKI,

Defendants/Cross-Plaintiffs/Cross-Defendants-Appellants,

and

L. J. SHEA & ASSOCIATES, INC., and LARRY SHEA,

Defendants/Cross-Plaintiffs/Cross-Defendants,

and

CITIZENS FIRST SAVING BANK and ARLINGTON TRANSIT MIX, INC.,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs,

and

TIMOTHY SNOBLEN, d/b/a SNOBLEN CONSTRUCTION,

Defendant/Counter-Plaintiff/Cross-Plaintiff/Third-Party Plaintiff,

UNPUBLISHED
December 21, 2006

No. 263200
Oakland Circuit Court
LC No. 2003-053062-CH

and

THEUT PRODUCTS, INC.,

Defendant,

and

PERMANENT SASH DOOR COMPANY and NATIONAL LUMBER COMPANY,

Defendants/Counter-Plaintiffs/Cross-Plaintiffs-Appellees,

and

HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND,

Defendant/Cross-Plaintiff,

and

CONSTANTINE CONSTRUCTION, INC.,

Third-Party Defendant.

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendants Stephen and Teri Lewicki ("the Lewickis") appeal as of right, challenging the trial court's orders granting summary disposition in favor of plaintiffs Daniel F. Gould, d/b/a Gould Contracting, and Gould Contracting, Inc. ("Gould"), and cross-plaintiffs National Lumber Company and Permanent Sash Door Company on their respective claims to enforce a construction lien. We affirm.

The Lewickis hired defendants Larry Shea and L. J. Shea & Associates, Inc. ("Shea") as the general contractor for the construction of a new home in Oakland Township. At some point during the construction, the Lewickis fired Shea and assumed responsibility for overseeing the construction. Gould, National Lumber Company, and Permanent Sash were each subcontractors hired by Shea who were not fully paid for work they performed or materials they supplied for the project. Gould filed this action to foreclose on a construction lien under the Construction Lien Act (CLA), MCL 570.1101 *et seq*. National Lumber and Permanent Sash brought cross-claims also seeking to foreclose on their construction liens. The trial court determined that the Lewickis had no defense to the lien claims and granted summary disposition in favor of all three claimants.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). All three lien

claimants, Gould, National Lumber, and Permanent Sash, moved for summary disposition under MCR 2.116(C)(9) and (10). Although the court did not identify the subrule under which it granted the motions, it is apparent that the court considered evidence beyond the pleadings, so MCR 2.116(C)(10) is the appropriate subrule to apply.[1]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

The Lewickis do not dispute that all three lien claimants have valid liens. Instead, they rely on MCL 570.1203 to argue that they may avoid the liens because they paid sufficient funds to Shea to satisfy the amounts owed to the claimants.

MCL 570.1203(1) and (2) provide:

> (1) A claim of construction lien shall not attach to a residential structure, to the extent payments have been made, if the owner or lessee files an affidavit with the court indicating that the owner or lessee has done all of the following:
>
> (a) Paid the contractor for the improvement to the residential structure and the amount of the payment.
>
> (b) Not colluded with any person to obtain a payment from the fund.
>
> (c) Cooperated and will continue to cooperate with the department in the defense of the fund.
>
> (2) In the absence of a written contract pursuant to section 114 [MCL 570.1114], the filing of an affidavit under this section shall create a rebuttable presumption that the owner or lessee has paid the contractor for the improvement. The presumption may be overcome only by a showing of clear and convincing evidence to the contrary.

MCL 570.1103(5) defines "contractor" as one who has an agreement with an owner or lessee of real property to provide an improvement. MCL 570.1106(4) defines a "subcontractor" as one who has an agreement with someone other than the owner to provide an improvement.

---

[1] A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings. Summary disposition is appropriate under this subrule only when the pleadings are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff 's right to recovery. *Slater v Ann Arbor Pub Schools Bd of Ed,* 250 Mich App 419, 425-426; 648 NW2d 205 (2002).

Stephen Lewicki filed an affidavit in which he recited the requirements of MCL 570.1203(1) and averred that he paid Shea, the general contractor, $178,061.58 pursuant to his contract with Shea. However, the Lewickis were not entitled to the benefit of the rebuttable presumption under MCL 570.1203(2) because there is no dispute that they had a written contract with Shea.

MCL 570.1203 is intended to provide for the payment of subcontractors and suppliers, but also protects homeowners from paying twice for improvements to their property where the contractor accepted money from the homeowner, but never paid the subcontractor or supplier. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 394; 594 NW2d 81 (1999). MCL 570.1203(1) is explained in 1 Cameron, Michigan Real Property Law, § 19.119, p 991, as follows:

> § 19.119. The act gives an owner or a lessee of a residential structure absolute protection from having a construction lien asserted against the property if he or she has made all payments required by the contract with the contractor. *See* MCL 570.1203(1). In such a case, the subcontractor, supplier, or laborer must look to the Residential Lien Recovery Fund for payment of the claim. If the owner fails to make all the payments, the residential structure is subject to all the methods and procedures for foreclosing on a construction lien in a nonresidential situation. MCL 570.1203(3)(a).

The defense referenced in MCL 570.1203 is based on MCL 570.1107(6), which provides as follows:

> If the real property of an owner or lessee is subject to construction liens, the sum of the construction liens shall not exceed the amount which the owner or lessee agreed to pay the person with whom he or she contracted for the improvement as modified by any and all additions, deletions, and any other amendments, less payments made by or on behalf of the owner or lessee, pursuant to either a contractor's sworn statement or a waiver of lien, in accordance with this act.

Under MCL 570.1107(6), an owner who pays the full contract price due the general contractor has an absolute defense to any liens that exceed the contract price. In this case, there is no dispute that the contract amount was $255,200, but the Lewickis paid only $178,061.58 to Shea. Because the Lewickis did not pay the full contract amount to Shea, they are not entitled to absolute protection against all lien claimants.

We agree that the Lewickis would have a defense it they were able to show that they paid Shea specifically for the work performed by the lien claimants. In *Erb Lumber, supra* at 397-400, this Court held that owners who had not paid the full contract price, but paid in advance for the materials provided by a lien claimant with an advance paid to the contractor, had a defense to the lien pursuant to MCL 570.1203. In that case, testimony at a bench trial allowed the trial court to find that the owners had paid the general contractor specifically for the materials supplied by the lien claimant. *Id.* at 391, 397-399. This Court concluded that the lien claimant's remedy was with the Michigan Homeowner Construction Lien Recovery Fund, MCL 570.1201 *et seq.*, and that the owners could not be required to pay twice for the same materials.

In this case, however, there is no evidence that the Lewickis' payments to Shea were specifically intended to cover the balances owed to the lien claimants. On the contrary, the Lewickis submitted a spreadsheet showing that their payments to Shea were applied to balances owed to other subcontractors. The Lewickis failed to establish a genuine issue of material fact that their payments to Shea were specifically intended for the lien claimants. Nothing in the record shows that the Lewickis are being asked to pay twice for the same work performed by the lien claimants.

Moreover, although the Lewickis claim that they should be deemed to have paid the lien claimants when they paid Shea, they may only be protected by MCL 570.1203 if they show that they paid Shea pursuant to either a sworn statement from Shea or a waiver of lien. As the court explained in *Steelcon, Inc v Bennett & Wright Group, Inc*, 257 F Supp 2d 895, 899 (ED Mich, 2003),

> [s]ection 570.1107(6), which protects owners by capping the value of construction liens at the contract balance specifically provides that an owner's liability is limited only if paid a contractor "pursuant to either a contractor's sworn statement or a waiver of lien, in accordance with this act."

MCL 570.1110(7) provides that an owner is not protected under MCL 570.1107(6) by relying on sworn statements from the general contractor, if the subcontractor has provided a notice of furnishing. *Steelcon, supra*. Similarly, an owner is not protected by MCL 570.1107(6) if he relies on a lien waiver from the general contractor once a subcontractor supplies a notice of furnishing. *Id.*; see also *Schuster Const Services, Inc v Painia Dev Corp*, 251 Mich App 227, 236-237 n 7; 651 NW2d 749 (2002).

A notice of furnishing is a notice from a subcontractor or supplier to the property owner and general contractor that labor and materials are being supplied to a project. See MCL 570.1109. It "notifies owners of the identity of subcontractors improving the property who may become future lien claimants." *Vugterveen Systems, Inc v Olde Millpond Corp*, 454 Mich 119, 122; 560 NW2d 43 (1997). In this case, each of the lien claimant provided a notice of furnishing to the Lewickis.

In *Vugterveen, supra* at 123-125, the Court explained sworn statements and waivers of lien as follows:

> The act also provides owners with information by requiring general contractors and subcontractors to make sworn statements itemizing their bills. MCL 570.1110 . . . . See *McAlpine & Keating*, [Construction Liens in Michigan], § 4.17, p 4-17. A general contractor must provide the owner with such a statement when payment is due or demanded, and whenever such a statement is demanded by the owner. MCL 570.1110(1) . . . . The subcontractor must provide a statement to the owner only when demanded, but must provide the general contractor with a sworn statement when payment is demanded. MCL 570.1110(2), (3) . . . . Thus, the owner can rely on a sworn statement as a comprehensive list of potential lien claimants.

> Sworn statements can also be used as a defense to a claim of lien. An owner or general contractor may rely on a sworn statement prepared by another party to avoid the claim of a subcontractor, unless the subcontractor has provided a notice of furnishing. MCL 570.1110(7) . . . .
>
> Potential lien claimants are required to provide a waiver of lien to the owner on payment. The act recognizes four types of waivers. MCL 570.1115 . . . Each type releases, to varying degrees, a potential claim of lien. See, generally, *McAlpine & Keating, supra*, §§ 4.23-4.40, pp 4-21 to 4-32. This allows an owner to compare the waivers of lien against the sworn statements, and to determine if there are any potential lien claimants who have not been satisfied. See *McAlpine & Keating, supra*, § 4.20, pp 4-18.
>
> The Legislature recognized that this system could be abused. Because it clouds title, a lien can be used by unscrupulous contractors to force property owners to pay excessive construction charges. Thus, the act protects owners by providing a defense to liens that would force owners to pay more than the price stated in the general contract. . . .

In addition, after an owner receives a sworn statement, he may withhold payments to cover the amounts due unpaid subcontractors. MCL 570.1110(6). There is no evidence in this case that the Lewickis withheld payments from Shea to ensure that the lien claimants were paid.

According to Shea's last sworn statement, dated March 25, 2003, the lien claimants had not been fully paid, but $96,040 had already been paid by Shea to itself and some subcontractors. At least $68,448.78 was still owed to the subcontractors and the balance due to complete the project was $80,068.42. Although the Lewickis are correct that if they paid $178,061.58 to Shea, this amount could have satisfied the amounts owed to Gould, National Lumber, and Permanent Sash, the Lewickis have not established that their payments were made consistent with the CLA. On the contrary, the spreadsheet that the Lewickis submitted, detailing the disbursements made by Shea, establishes that Shea made payments to other subcontractors and did not use the payments from the Lewickis to pay the remaining amounts due Gould and National Lumber (although both had previously received partial payments), and that Permanent Sash had not received anything.

The Lewickis' affidavit establishes that they paid $82,021.58 to Shea after receiving the last sworn statement in March 2003. The Lewickis did not present any other evidence to show that their payments went to the lien claimants to pay the balances owed to them. The Lewickis had notice of the balances due the subcontractors, including the lien claimants, before paying Shea. They should have obtained lien waivers from those subcontractors. As explained in Cameron, p 985, § 19.112:

> The sworn statement must list all the contractor's subcontractors, suppliers, and laborers for whom wages or fringe benefits or withholdings are due but unpaid and the amounts owed to them. *An owner should obtain unconditional lien waivers from all persons shown on the sworn statement for any amounts shown that are owed to them.* Amounts shown as paid should have been covered with sworn statements and with lien waivers on previous draws. All

> subcontractors, suppliers, and laborers identified in the sworn statement should be paid only against a lien waiver. [Emphasis supplied.]

In sum, the Lewickis did not submit any evidence showing that Shea paid the lien claimants in this case, and the Lewickis did not obtain lien waivers as payments were made to Shea. Further, as noted previously, there was no evidence that the Lewickis' payments to Shea were specifically intended for the lien claimants. Under these circumstances, the trial court did not err in granting the lien claimants' motions for summary disposition.

In an unrelated issue, the Lewickis argue that reversal is required because the lien claimants disclosed the case evaluation awards in their motions for summary disposition, contrary to MCR 2.403(N)(4). The Lewickis argue that the trial court should have disqualified itself and that the matter should be remanded and reassigned to a new judge. We disagree.

We agree that Gould and Permanent Sash clearly violated MCR 2.403(N)(4) by revealing the case evaluation awards to the trial court. National Lumber arguably had a valid reason for revealing that it had accepted a partial case evaluation award, because the award reduced the amount it could recover from the Lewickis. Nevertheless, a violation of the court rule does not always require a new trial or disqualification of the judge involved. *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 14; 662 NW2d 94 (2003). In this case, the trial court decided this matter on summary disposition. It was not acting as a trier of fact. In this context, the court could not have been improperly influenced by the disclosure of the case evaluation awards. Furthermore, we have reviewed this matter de novo and have likewise concluded that the lien claimants were entitled to judgment as a matter of law. Under these circumstances, the violation of MCR 2.403(N)(4) does not warrant appellate relief.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper